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IN THE

Supreme Court of the United States

October Term, 1956

No. 41

AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, LOCAL NO. 427, AFL, *et al.*,
Petitioners,

v.

FAIRLAWN MEATS, INC.,
Respondent.

On Writ of Certiorari to the Supreme Court of Ohio

BRIEF FOR AMERICAN RETAIL FEDERATION, THE OHIO STATE COUNCIL OF RETAIL MERCHANTS, AND OHIO CHAMBER OF COMMERCE, AS AMICI CURIAE

Pursuant to written consent of the parties, which has been filed with the Clerk of this Court pursuant to Rule 42(2), American Retail Federation, The Ohio State Council of Retail Merchants, and Ohio Chamber of Commerce respectfully submit this brief as *amici curiae* in support of Respondent herein.

INTEREST OF AMICI CURIAE

The American Retail Federation is an association consisting of 30 national retail associations and 37 statewide retail groups, comprising a membership in excess of 700,000 retail stores and employing an estimated

7,500,000 persons. The Ohio State Council of Retail Merchants is a trade association of retailers in Ohio, organized to keep its membership advised concerning developments in the retail industry including those in the field of labor-management relations. The Council has a membership of approximately 2,500 retail stores located all over the state of Ohio and employing an estimated 200,000 persons. Such State Council is one of the state-wide retail groups in the American Retail Federation. Ohio Chamber of Commerce is an association representing all classes, both large and small, of business, industry, agriculture and the professions in the state of Ohio. It has a membership of over 6,000, who employ in excess of 1,300,000 persons.

Most of the members of the American Retail Federation and of The Ohio State Council of Retail Merchants are small retailers. Their operations nevertheless may be considered by the courts to affect commerce and therefore be subject to the jurisdiction of the National Labor Relations Act. 61 Stat. 136, 29 U.S.C. Supp. V, 151 *et seq.* Similarly, many of the members of the Ohio Chamber of Commerce are small businesses, which may likewise be subject to the jurisdiction of that Act. However, under the announced jurisdictional standards of the National Labor Relations Board (see Respondent's Brief, Appendix B), the Board would decline to take jurisdiction over any labor controversy involving such small retailers and other small businesses. In such circumstances, unless such small retailers and other small businesses can have recourse to the state courts to obtain relief against unlawful strikes and picketing, they will have to suffer damage without legal redress.

Retail stores above all other businesses are perhaps most vitally in need of a forum to which to apply for relief when faced with unlawful strikes and picketing. Picketing by a minority union of a store to compel the

employer to enter into a union-shop agreement, as in the instant case, is an unlawful activity. Such picketing causes the retail stores almost irreparable loss immediately, because the public, upon whose constant patronage the retail store depends, will stay out of a store being picketed regardless of the merits or legality of the picketing. Likewise the life-blood of the retail store is the constant delivery of new merchandise to it for sale. If a union engages in secondary boycott picketing of the store's suppliers or delivery companies, again as in the instant case, then notwithstanding the illegality of such secondary boycott picketing, the store is immediately damaged seriously. Retail stores thus must have a forum to which to apply for relief and are accordingly vitally interested in the Court's upholding the ruling below that the state court has jurisdiction to act where the National Board declines jurisdiction.[1] This brief will address itself simply to that issue.

ARGUMENT

WHERE THE NATIONAL LABOR RELATIONS BOARD DECLINES FOR POLICY REASONS TO TAKE JURISDICTION OF A PARTICULAR CASE, A STATE COURT HAS JURISDICTION TO ACT IN THE CASE.

It is basic that the subject of labor relations falls within the competence of states to regulate and control. *Bethlehem Steel Co.* v. *N. Y. State Labor Relations Board,* 330 U.S. 767, 772. While Congress may occupy the field to the exclusion of the states, its intention to achieve that result must be clearly shown. *Allen Bradley*

[1] As Respondent's Brief points out, the case here is one where the National Board would decline to exercise its jurisdiction and it would have been futile therefore for Respondent to seek any relief through it.

Welfare on S. 249, 81st Cong., 1st Sess., pp. 175-176. See in particular Senator Taft's approval of the Board's policy of not taking jurisdiction over small enterprises having but a minor effect upon interstate commerce. *Id.*, p. 177.[2] See also *H. Rept. 1852*, 81st Cong., 2nd Sess., p. 10, and *S. Rept. 986*, 80th Cong., 2nd Sess., Part 3, pp. 14-15.

The foregoing shows that the case at bar, in the language of the Court in the *Bethlehem Steel* case, quoted *supra*, p. 4, presents a situation of a "separable or distinct segment of the matter covered by the federal statute" and one where "the federal agency has not acted on that segment". Since Congress has approved that inaction by the federal agency, it would be inconsistent to hold that it has pre-empted such cases. Rather it is clear in the circumstances that Congress has not pre-empted those cases and that a state is free to apply its own law and policy.

B. Permitting State Court Jurisdiction Here Raises No Possibility of Conflict With Federal Authority.

This Court has clearly shown that the basis of the pre-emption doctrine in the labor field is the actual or potential conflict that could arise with NLRB adjudication if other tribunals were allowed jurisdiction. See *Garner* v. *Teamsters Union*, 346 U.S. 485, 490-491, 498-499; *United Construction Workers* v. *Laburnum Construction Corp.*, 347 U.S. 656, 663, note 5. In the latter case the Court said (347 U.S. at 665):

[2] This Court also has long been aware of the Board's policy of refraining "for budgetary or other reasons" to take jurisdiction in particular cases (*Bethlehem Steel Co.* v. *N. Y. State Labor Relations Board*, 330 U.S. 767, 776) and has approved such policy. *NLRB* v. *Denver Bldg. & Const. Trades Council*, 341 U.S. 675, 684.

> "To the extent that Congress prescribed preventive procedure against unfair labor practices, that case [Garner] recognized that the Act excluded conflicting state procedure to the same end . . . The care we took in the *Garner* case to demonstrate the existing conflict between state and federal administrative remedies in that case was, itself, a *recognition that if no conflict had existed*, the state procedure would have survived. . . ." (Emphasis Supplied)

There can of course be no conflict if the federal government, through its duly constituted agency, not only does not act in a particular case, but specifically announces that it will not take jurisdiction over the matter because such matter does not satisfy its jurisdictional standards. It would seem clear that in such a case where there is no conflict with federal authority and Congress has deliberately curtailed the federal agency's activities by approving its jurisdictional standards, a state court has jurisdiction to deal with such case.

C. The Authorities Are Plain That the State Court Had Jurisdiction to Proceed Here.

The highest courts of at least four states have flatly held that where the National Board declines jurisdiction for policy reasons as here, a state may act.[3] There are no decisions of the highest court of any state to the contrary. Moreover, seven state labor boards have considered the problem and without exception all have held that they may assert jurisdiction in cases where the National Board declines jurisdiction because its jurisdictional

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[3] *Cain, Brogden & Cain* v. *Teamsters* (Tex.), 285 S.W.(2d) 942, 37 LRRM 2298; *Garmon* v. *San Diego Bldg. Trades Council* (Calif.), 291 P.(2d) 1, 37 LRRM 2233; *Guss* v. *Utah Board* (Utah), 296 P.(2d) 733, 38 LRRM 2137; *Building Trades Council of Reno* v. *Bonito* (Nev.), 280 P.(2d) 295, 35 LRRM 2600.

standards are not met.[4] No state labor board has ruled to the contrary.

Since as this Court has recognized labor disputes have an immediate and direct impact upon the local community (*Bethlehem Steel Co.* v. *N. Y. State Labor Relations Board*, 330 U.S. 767, 772), these state courts and boards feel that for protection of the state and the welfare and health of its citizens, a state may act in a situation where the National Board declines to do so. Otherwise, there is a total absence of regulation to the plain detriment of the entire community. The state courts and boards also believe that they may act in these circumstances lest an injured party's property be destroyed unlawfully without his having any place to which to turn to obtain redress.

The lower federal court and lower state court decisions, upon which Petitioners rely (Pet. Br., p. 67, note 32), are distinguishable. Either they contain only contrary *dicta*, or they involve a situation where the National Board asserted jurisdiction or at least it was not clear, as it is here, that the National Board would not have asserted jurisdiction, or they are in conflict with other decisions of courts of like jurisdiction in the same state.

D. Practical Considerations Also Require a Holding in Favor of State Court Jurisdiction.

The National Board has a policy of refraining from intervening where a state court takes jurisdiction over matters with respect to which the Board as a matter of

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[4] *Guss* v. *Utah Board* (Utah), 296 P.(2d) 733, 38 LRRM 2137; *Raisch Motors*, 35 LRRM 1631 (N. Y. Board); *Ideal Soap & Chemical Co.*, 38 LRRM 1043 (Pa. Board); *Interstate Overall Service, Inc.*, 37 LRRM 1431 (Mass. Board); *Ashland Motor Co.*, 37 LRRM 1116 (Wisconsin Board); *Hilton Hotels*, 37 LRRM 1474 (Puerto Rican Board); *Walker Motors*, 36 LRRM 1290 (Mich. Board).

policy declines jurisdiction. See discussion of this subject in Respondent's Brief.

The Board likewise has a policy of declining to exercise its statutory jurisdiction in deference to an available arbitral remedy. *UE* v. *Worthington Corp.*, 38 LRRM 2507, 2510 (C.C.A. 1); *Spielberg Mfg. Co.*, 112 NLRB 1080, 36 LRRM 1152. These policies permit the Board to conserve its time and personnel for the "prompt handling of major cases" (*Breeding Transfer Co.*, 110 NLRB 493, 35 LRRM 1020, 1021), and this Court has approved that policy. *NLRB* v. *Denver Bldg. & Const. Trades Council*, 341 U.S. 675, 684. But such policies, which clearly serve to effectuate the Act's purposes, will be frustrated if a state or arbitrator is precluded from acting even in circumstances where the National Board declines jurisdiction, because then the Board will be compelled to take jurisdiction over all cases, no matter how minor the effect upon commerce. Otherwise "offenders . . . may destroy property without liability for the damage done". *United Construction Workers* v. *Laburnum Construction Corp.*, 347 U.S. 656, 669. The Board's time and personnel will thus be devoted to minor matters to the detriment of its proper handling of much more important ones.

E. Petitioners' Contention Based Upon the Proviso to Section 10(a) of the Act Is Untenable.

Petitioners argue at length in their brief that unless the National Board has ceded jurisdiction to a state board in the manner provided in the proviso to Section 10(a) of the Act, a state may not act in a labor dispute affecting commerce (Pet. Br., pp. 59-83). This argument, we submit, is unsound. First, the proviso to Sec. 10(a) shows by its terms that it applies only to a case where the Board asserts jurisdiction. When that occurs, the proviso spells out the manner and circumstances under which the Board may cede that asserted jurisdiction to

a state agency. On the other hand, where the Board does not enter an area at all, the Sec. 10(a) proviso is wholly inapplicable. Then, the states may act under fundamental principles which recognize the competence of states to regulate and control labor relations and disputes save only as the Congress has pre-empted the area; and there is no basis for implying the exclusion of this fundamental state authority when the Congress, through its duly constituted agency, the National Board, declines to enter a particular area.

Second, the proviso to Sec. 10(a) was enacted by Congress to solve the problem posed by this Court's decision in the *Bethlehem Steel* case, 330 U.S. 767, which seemed to hold that there was no manner in which the National Board could cede jurisdiction to a state agency. See *S. Rept. 105*, 80th Cong., 1st Sess., Part 1, p. 6 and Part 2, p. 38. But the *Bethlehem Steel* case involved a nation-wide steel company over which the Board has always asserted jurisdiction. Plainly then what Congress was seeking to do in the Sec. 10(a) proviso was to create a method whereby in cases where the Board does assert jurisdiction, it may cede that jurisdiction to a state agency. *Bethlehem Steel* in no way dealt with the problem here presented and this Court recognized that fact. 330 U.S. 767 at 776. That being the case and the Bethlehem Steel decision being the reason why Congress enacted the Sec. 10(a) proviso, there is no basis for attributing to Congress an intent to deal with the problem in such proviso.

Third, the debates on the Taft-Hartley Act conference report show that Congress did not intend by the Act to interfere with the administration of state laws. 93 Cong. Rec. 6540.[5] Yet Petitioners' construction of the Sec. 10(a)

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[5] This is subject, of course, to the qualification that the state laws may not conflict with the federal law. As we have shown, there can be no such conflict where the National Board declines to act.

proviso would lead to a vast amount of such interference, a result directly contrary to the foregoing expression of Congressional wilk Since, as we have shown, no such construction is necessary in órder to give meaning and effect to the Sec. 10(a) proviso, the proviso should not be so construed.

Petitioners appear also to argue that there can be a uniform application of law in labor controversies only if states are precluded from acting except under cession agreements with the National Board. In answer, it should be pointed out first that there would be no such uniformity under Petitioners' position, unless the National Board took jurisdiction over every case, an obviously impossible situation in view of the budgetary limitations upon the Board. Second, by limiting the cession provision of Section 10(a) to areas where the National Board asserts jurisdiction, uniformity is achieved in those areas, for cession is allowed only if the state law is consistent with the federal. But where the federal government stays out of the area entirely, uniformity is unimportant because then there can be no possible conflict between federal and state authority. *Supra*, pp. 6-7. And finally, whatever merit there is to Petitioners' uniformity argument is far out-weighed by the overriding necessity of giving a person his day in court when he has suffered unlawful wrong. If he cannot have that day before the National Board, he should certainly be allowed it through state action.[6]

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[6] Contrary to Petitioners' contention, no inferences can be drawn from the failure of Congress to repeal the proviso to Section 10(a). As Respondent points out in its brief, Petitioners' reliance here is at best only upon "incompleted steps in the legislative process" and this Court will not draw inferences from such incompleted steps. *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 47-48.

CONCLUSION

The judgment below, holding that the state court had jurisdiction over the labor controversy here involved, should be affirmed.

Respectfully Submitted,

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